No. 86-1464

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROSA M. CORBETT, PETITIONER

v.

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a handicapped person may bring a claim of employment discrimination against the United States Postal Service under either Section 501 or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 791, 794, without meeting the requirements of Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), that an action be filed within 30 days of the plaintiff's receipt of notice of final agency action and that the action name the Postmaster General as the defendant.

2. Whether the court of appeals correctly held that petitioner's attempt to amend her complaint five months after it was filed in order to name the proper federal defendant did not relate back to the date on which the complaint was filed, because petitioner had failed to satisfy the requirements of Fed. R. Civ. P. 15(c) for relation back in situations in which a plaintiff fails to name the proper federal officer as the defendant.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A4) and of the district court (Pet. App. C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on January 7, 1987 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1981, petitioner filed an administrative complaint with the Western Regional Headquarters of the United States Postal Service (USPS) alleging that she had been terminated from her position as a distribution clerk because of her physical handicap, in violation of Sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 791, 794.[1] On September 29, 1982, petitioner received a letter from the Regional Postmaster General informing her of the final agency decision finding no discrimination (Pet. App. D1) and further informing her that she either could appeal this decision to the Equal Employment Opportunity Commission within 20 days or, in lieu of such an appeal, could file a civil action in the appropriate district court within 30 days of her receipt of the decision (*id.* at D2-D3).

On October 29, 1982, exactly 30 days after her receipt of notice of the final agency decision, petitioner through counsel filed a complaint in the United States District Court for the Northern District of California. She again alleged (among other things) that her termination was in violation of Sections 501 and 504 of the Rehabilitation Act, and named the Postmaster of the Post Office of Oakland, California, the Director of Mail Processing of that office, and the USPS as defendants. Petitioner, however, failed to name the Postmaster General as a defendant. She served a copy of the complaint on the United States Attorney on November 18, 1982, and served the other named defendants on November 24, 1982.

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[1] Petitioner also originally raised claims of employment discrimination on the basis of national origin and claimed violations of the Constitution as well as the Rehabilitation Act, but she is no longer pursuing those claims.

On March 23, 1983, the government moved to dismiss the complaint. The government argued that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, applies to this action [2] and that the district court lacked subject-matter jurisdiction because petitioner had failed to name the only proper defendant under Section 717(c) of Title VII (42 U.S.C. 2000e-16(c)), the Postmaster General.[3] The government also argued that petitioner's Section 504 claim must in any event be dismissed because the only basis for a claim of handicap discrimination in federal employment is Section 501 of the Rehabilitation Act.

On March 28, 1983, petitioner moved for leave to amend her complaint to substitute the Postmaster General as the defendant. The government opposed the motion, arguing that the requirements of Fed. R. Civ. P. 15(c) for an amended complaint to relate

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[2] Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. 794a(a)(1), provides in pertinent part that "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) * * * shall be available with respect to any complaint under section 791 of this title [*i.e.*, Section 501 of the Rehabilitation Act]." As discussed below, it is the government's position (and the unanimous view of the courts of appeals) that the procedures of Title VII are applicable to any cause of action for handicap discrimination in federal employment, including one purporting to be brought under Section 504 of the Rehabilitation Act.

[3] Section 717(c) requires that an action be brought against "the head of the department, agency, or unit, as appropriate." As petitioner's argument implicitly acknowledges (Pet. 20-21, 33 n.5, 39-40 & n.6), Section 717(c) has uniformly been interpreted to make the Postmaster General the only appropriate defendant in an action alleging employment discrimination by the USPS.

back were not met because petitioner had not served any governmental entity with a copy of the complaint within the 30-day statutory period for commencing her suit.[4] In an order dated April 27, 1983, the district court dismissed petitioner's Section 504 claim without prejudice but permitted petitioner to amend her complaint to name the Postmaster General as the sole defendant.

On November 9, 1984, the Postmaster General moved to dismiss for failure properly to name the correct defendant, relying on the Ninth Circuit's then-recent decision in *Cooper* v. *USPS*, 740 F.2d 714 (1984), cert. denied, 471 U.S. 1022 (1985), a Title VII case in which, as in this case, the plaintiff had named the USPS in a timely complaint but had not named the Postmaster General or served any federal representative within the 30-day statutory period. Petitioner opposed this motion, and the district court granted her request to stay the action pending this Court's action on a petition for a writ of certiorari in *Cooper*. Following this Court's denial of that petition on April 15, 1985, the government renewed its motion to dismiss. Petitioner then sought leave to amend her complaint to add the Section 504 claim and the three individual defendants previously dismissed by the district court.

On October 15, 1985, the district court denied leave to amend the complaint and granted the motion to dismiss. The court followed the Ninth Circuit's decision in *Boyd* v. *USPS*, 752 F.2d 410, 413 (1985), holding that Section 501 of the Rehabilitation Act

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[4] Section 717(c) of Title VII provides for suit "[w]ithin thirty days of receipt of notice of final action taken by a department, agency, or unit."

is the exclusive remedy for discrimination in employment by the USPS on the basis of handicap (Pet. App. C2-C3). In addition, the district court concluded that "*Cooper* made it clear that the Postmaster General is the only proper defendant for a section 501 action and must be served within the 30 day period specified under 42 U.S.C. § 2000e-16(c)" (Pet. App. C4).

2. The court of appeals affirmed in a brief per curiam memorandum (Pet. App. A1-A4). In reliance on its decision in *Cooper*, the court first stated that petitioner's action under the Rehabilitation Act was required to have been brought against the Postmaster General (*id.* at A2). Next, the court pointed out that petitioner had failed to name the proper defendant and that her "untimely efforts to add the Postmaster General by amendment were properly rejected by the district court" (*id.* at A2-A3).[5] The court of appeals explained that the amendment did not relate back under Fed. R. Civ. P. 15(c) because the Rule's requirement of timely notice to a federal defendant would be met only "if the Postmaster General, the United States Attorney, or the United States Attorney General were served with the original complaint within the 30-day period * * * [but] [n]one were so served" (Pet. App. A3). Finally, the court held that, under its previous decision in *Boyd*, Section 501 of the Rehabilitation Act is the exclusive remedy against the USPS for a claim of employment discrimination on the basis of physical handicap (Pet. App. A4).

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[5] The court stated that "[t]he 30-day filing period of section 2000e-16(a) [*sic*] is jurisdictional" (Pet. App. A3). The court did not indicate what relevance, if any, that proposition had to its analysis.

ARGUMENT

The decision of the court of appeals is correct and does not merit further review by this Court.

1. Petitioner contends (Pet. 16-17, 22-28, 53-54, 58-61) that the Court should grant certiorari to determine whether there is a cause of action under Section 504 of the Rehabilitation Act for handicap discrimination in federal employment.[6] She correctly notes that the courts of appeals are divided on that question. Some, observing that Section 501 directly addresses discrimination in federal employment whereas Section 504 addresses discrimination under federally funded or conducted programs or activities, hold that Section 501 is the exclusive remedy in federal employment cases.[7] The Fifth, Sixth, and Eighth Circuits, however, hold that such cases may be brought under both Section 501 and Section 504.[8]

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[6] Section 504 prohibits discrimination on the basis of handicap "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

[7] See, *e.g.*, *Boyd*, 752 F.2d at 413; *McGuinness* v. *USPS*, 744 F.2d 1318, 1321 (7th Cir. 1984) (suggesting without deciding that Section 504 "is inapplicable to federal employment"). These courts have recognized this Court's decision in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), that Section 504 reaches employment discrimination by recipients of federal funds, but have declined to extend that holding to employment discrimination by the federal government itself in light of the remedy Congress already provided in Section 501. Petitioner's claim (Pet. 58-61) that the decision below conflicts directly with *Darrone* is therefore incorrect.

[8] See, *e.g.*, *Morgan* v. *USPS*, 798 F.2d 1162, 1164 n.2 (8th Cir. 1986), cert. denied, No. 86-5979 (Mar. 30, 1987); *Smith* v. *USPS*, 742 F.2d 257, 260 (6th Cir. 1984); *Prewitt* v. *USPS*, 662 F.2d 292, 304 (5th Cir. 1981) (*Prewitt I*).

There is no need for this Court to resolve that split in the circuits, however, for "it is not even clear that there is a practical difference between the two views, * * * [and] it [is] a matter of merely technical interest whether both statutes, or only [Section 501], create a remedy for federal employment discrimination against the handicapped" (*McGuinness*, 744 F.2d at 1321-1322; see also *Boyd*, 752 F.2d at 414 ("makes little practical difference")). Those plaintiffs who try to bring an action under Section 504, despite having available an action under Section 501, do so (as petitioner did) in order to attempt to escape the procedural requirements of Title VII. These efforts have been uniformly unavailing, however, because *all* circuits that have addressed the question have agreed that a Section 504 action for discrimination in federal employment, if it exists, must be brought under the procedures of Title VII. *Morgan*, 798 F.2d at 1164-1165; *Gardner* v. *Morris*, 752 F.2d 1271, 1279 n.7 (8th Cir. 1985); *Boyd*, 752 F.2d at 413; *McGuinness*, 744 F.2d at 1321-1322; *Smith*, 742 F.2d at 262; *Prewitt I*, 662 F.2d at 304; *Prewitt* v. *USPS*, 662 F.2d 311, 314 (5th Cir. 1981) (*Prewitt II*).[9]

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[9] Petitioner argues (Pet. 17-19, 28-33) that these decisions are incorrect and that, indeed, she should not have been required to follow the procedures of Title VII even with respect to her claim under Section 501. For reasons stated at pages 3-6 of our brief in opposition in *Morgan*, a copy of which we are serving on petitioner's counsel, this Court should not review the unanimous holding of the courts of appeals that a Section 504 action for discrimination in federal employment, if it exists at all, is subject to the procedures of Title VII. As we noted in that brief, the unanimous rule of the courts of appeals is supported by, among other things, this Court's decisions in *Brown* v. *GSA*, 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Con-

Although these cases have primarily addressed the requirement of Title VII that administrative remedies be exhausted, there is every reason to believe that they apply to the other procedural requirements of Section 717 as well. See, *e.g.*, *Morgan*, 798 F.2d at 1165 n.3 (applying Section 717 requirement that Postmaster General be the named defendant); *McGuinness*, 744 F.2d at 1322-1323 (same); *Prewitt I*, 662 F.2d at 304 (action against federal government under Section 504 is "subject to the same procedural constraints (administrative exhaustion, etc.)" as a Section 501 action); *Prewitt II*, 662 F.2d at 314; S. Rep. 95-890, 95th Cong., 2d Sess. 18-19 (1978) (emphasis added) (Congress intended to make the federal government responsive to employment discrimination claims by the handicapped in the "same" manner as it was responsive to claims by other minorities, "subject, of course, to the provision for exhaustion of administrative remedies *and other rules and procedures* set forth in Title VII").

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gress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."), and *Smith* v. *Robinson*, 468 U.S. 992, 1012-1013 (1984) (Congress intended plaintiffs with cognizable claims under the Education of the Handicapped Act to follow administrative procedures prescribed by that Act rather than to bring suit directly under more general provisions). As to petitioner's claim that not even Section 501 actions require the application of Title VII procedures, petitioner offers no sufficient basis for this Court to review the well-established view of all the courts of appeals, which is based directly on the plain language of Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. 794a(a)(1). The fact that that Section declares Title VII procedures to be "available" means—since Congress has made no other procedures "available"—that they must be followed if a claim is to be pursued at all, and not, as petitioner would have it, that those procedures are optional.

Since those courts that recognize Section 504 actions require the same compliance with Title VII procedures that is required in Section 501 actions, the existence vel non of a Section 504 action is not an issue of general importance warranting this Court's review. And, although the court of appeals rejected petitioner's Section 504 claim for failure to state a cause of action, that court has already made clear that it would apply Title VII procedures if it did recognize such a cause of action (*Boyd*, 752 F.2d at 413). Thus, even if the court of appeals were reversed on the question whether there is a Section 504 action, petitioner's Section 504 claim would still stand or fall with her Section 501 claim, which the court of appeals has already rejected.[10]

2. Petitioner also contends that a plaintiff who files suit within the 30-day period of Section 717(c), but does not serve any federal party until after the 30-day period and does not name the proper defendant until five months after she files her suit, should be allowed to proceed as if suit had been brought in a timely fashion. Her contentions in this regard are precisely identical to those made in *Cooper*, and there

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[10] Petitioner claims for two reasons that the court of appeals erred in rejecting her Section 501 claim. One asserted reason—that the court improperly failed to excuse her tardiness in naming the Postmaster General as a defendant—is addressed below. The other—that the Postmaster General is not the proper defendant under Title VII (Pet. 20-21, 33 n.5, 39-41)—is entirely without foundation. Under the Title VII procedures made applicable by Section 505(a)(1), the proper defendant is "the head of the department, agency, or unit, as appropriate" (42 U.S.C. 2000e-16(c)), and petitioner does not and cannot deny that the Postmaster General is the head of the USPS, as all courts to consider the matter have concluded.

is no more reason to grant certiorari on this issue than in *Cooper*.[11] Indeed, there is considerably less reason, because this Court has, since *Cooper*, clarified the application of Fed. R. Civ. P. 15(c) in *Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986).

a. Petitioner contends (Pet. 19, 41-46, 54-57) that the Court should grant certiorari to determine whether the 30-day time limit of Section 717(c) is subject to waiver, estoppel, or equitable tolling or is, instead, "jurisdictional." In this case (Pet. App. A3), as in *Cooper* (740 F.2d at 716), the court of appeals did make a passing observation that the time limit is "jurisdictional," but in this case, as in that one, the issue that petitioner seeks to raise simply is not presented.

The issue is not presented for two reasons. First, petitioner did in fact file her complaint within 30 days of receipt of the notice of final agency action. Accordingly, neither the district court nor the court of appeals held that dismissal of her suit was required because the doctrines of waiver, estoppel, and equitable tolling are inapplicable in a federal sector Title VII (or Rehabilitation Act) suit. By contrast, the appellate decisions indicating that the 30-day period in Section 717(c) is not "jurisdictional" in nature—which, according to petitioner, conflict with the decision below—deal expressly with situations in which the plaintiff did *not* file an action within 30 days of receipt of the final agency action. See *Zografov* v. *V.A. Medical Center*, 779 F.2d 967 (4th Cir. 1985); *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam* v. *USPS*, 674 F.2d 860 (11th Cir.

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[11] We are serving on petitioner's counsel a copy of our brief in opposition in *Cooper*.

1982).[12] Second, even if equitable tolling were applicable to failures to name the correct defendant in a timely fashion, as well as failures to file suit in a timely fashion, petitioner, who was represented by counsel, has offered no facts peculiar to her case on which such tolling could be justified.

Therefore, although it is unclear what the court of appeals meant by its passing observation in this case that the 30-day limit in Section 717(c) is "jurisdictional," that characterization is dictum. Because petitioner filed a complaint within 30 days, the issue is properly resolved under Fed. R. Civ. P. 15(c), concerning amendment of complaints to substitute a new defendant. The court of appeals made clear that, if the requirements of Rule 15(c) had been satisfied, it would have held that the amendment related back even though the court stated that the 30-day filing period is "jurisdictional."

b. Contrary to petitioner's contention (Pet. 19-20, 33-38, 46-52), there is no reason for this Court to grant certiorari to review the interpretation of Rule

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[12] Petitioner also maintains (Pet. 41-42) that *Hendrix* v. *Memorial Hospital*, 776 F.2d 1255 (5th Cir. 1985), *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981), and *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982), conflict with the ruling here. *Hendrix* and *Sessions*, however, do not involve a construction of Section 717(c) at all, but instead address the 90-day limitation applicable under Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f), in suits against private employers and state and local governments. In addition, the court in *Hendrix* was not presented with and did not decide any issue about the jurisdictional or nonjurisdictional nature of any time limitation. Nor does the decision in *Saltz* concern the suit-filing limitation of Section 717(c); it deals only with the time period for filing an *administrative charge*. See 29 C.F.R. 1613.214(a).

15(c) by the court of appeals to require actual notice to the substituted defendant within the statutory time period. Petitioner does not claim that she served the proper defendant with timely notice of her complaint, but argues instead (Pet. 48-49) that the notice requirement should be read to include a reasonable time for service of process under Fed. R. Civ. P. 4.

Last Term, this Court granted certiorari to resolve this precise question, noting "an apparent conflict among the Courts of Appeals." *Schiavone* v. *Fortune*, slip op. 1 (footnote omitted); see also *Cooper*, 471 U.S. at 1024-1025 (White, J., dissenting from denial of certiorari).[13] The Court in *Schiavone* resolved the conflict that petitioner points out by her reliance on the pre-*Schiavone* cases. The Court determined, relying on a literal reading of Rule 15(c), that an amended complaint cannot relate back unless the defendant to be substituted by the amendment had "notice within the limitations period" (slip op. 10). The Court wrote (*id.* at 9):

> We are not inclined * * * to temper the plain meaning of the language [of Rule 15(c)] by en-

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[13] As Justice White's dissent from denial of certiorari in *Cooper* notes, the government argued in that case that the second paragraph of Rule 15(c) requires service of process on one of the federal officials there designated within the time provided by law for commencing the action, whether or not the first paragraph of Rule 15(c) should be construed to allow relation back of an amendment substituting *private* defendants based on service of process within a reasonable time after the timely filing of a complaint (see Br. in Opp. at 15-23, *Cooper* v. *USPS*, *supra*). Now that the Court has rejected the "reasonable time" construction for private defendants, it follows *a fortiori* that it should be rejected for federal defendants.

> grafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the the action against" the defendant. An action is commenced by the filing of a complaint * * *.

The decision of the court of appeals is accordingly correct.[14]

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[14] Petitioner seeks to distinguish *Schiavone* on the ground that in the present case ascertainment of the identity of the proper defendant was difficult (Pet. 46-48 n.10). Even were that true, it would not seem a sufficient basis to distinguish *Schiavone*, which rested on a literal interpretation of Rule 15(c) and not on the theory that Rule 15(c) applies only when ascertainment of the defendant's identity is easy. In fact, however, it should not have been difficult for petitioner's counsel, who represented her in both the administrative proceedings and the court proceedings, to determine the identity of the proper defendant. Whatever ambiguity existed at the time the action was filed concerning the applicability of Title VII procedures to efforts to raise claims under Section 504 (but see *Prewitt I*, 662 F.2d at 304, and *Prewitt II*, 662 F.2d at 314, both decided well before petitioner filed her complaint), it was quite clear at the time from the language of Section 505(a)(1) that Title VII procedures must be followed in order for petitioner to pursue her Section 501 claim. See note 2, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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